Shanmugam a/l Gopal v Zinal Abidin bin Nazim & Anor

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–153 OF 2000
MOHD NOOR ABDULLAH J
28 MARCH 2003

Damages (Personal Injury or Death) *— Personal injuries — Loss of future earnings and loss of earning capacity — Whether loss of future earnings and earning capacity can be implied where injuries lead to continuing and permanent disability — Whether the sessions court judge was wrong in failing to make an award for loss of earning capacity — Whether the sessions court judge had failed to make an award for pain and suffering*

The appellant/plaintiff appealed against the decision of the sessions court judge and the appeal proceeded on two grounds. The issues to be determined by the court were: (i) whether the learned sessions court judge was wrong in failing to make an award for loss of earning capacity; and (ii) whether the sessions court judge had failed to make an award for pain and suffering for a future operation which the plaintiff had to undergo.

Held, allowing the appeal with costs:

(1) The learned sessions court judge did not make an award for loss of earning capacity. His reasoning in the grounds of decision was that it was only the doctor who testified on the loss of earning capacity, whereas the plaintiff did not say so. In assessing damages, the future loss of earnings and loss of earning capacity can be implied in law, and is included in cases where the injuries suffered were such as to lead to continuing or permanent disability. The learned trial judge should have given credence to the evidence of the expert, especially so when it remained unchallenged and no expert was called by the defence to refute this evidence. Thus, the learned sessions court judge was wrong in failing to make an award for loss of earning capacity. Based on the authorities and inflation and loss in value of money, the High Court made an award of RM20,000 for loss of earning capacity (see pp 79B–D, G–H, 80A–B); *Lee Chong Keong v Cheang Kok Weng & Anor* [1996] 4 MLJ 133, *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786 and *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 followed.

(2) The next issue raised by the appellant's counsel was with regard to the failure of the sessions court judge to make an award for pain and suffering for the future operation which the plaintiff had to undergo for the removal of the plate and screws. General damages which are awarded for a tortuous act committed against a person or his property is a civil remedy which has as its aim to put the injured party back as it were, as far as possible to his original position maintained by him prior to the tortuous act which resulted in injury or damage. Although this is a future operation, the award for pain and suffering has to be made at the date of the

decision so as to bring about the finality of the claim. The court therefore made an award in the sum of RM5,000 for pain and suffering for the future operation (see pp 80B–D, F–G).

[Bahasa Malaysia summary

Perayu/plaintif telah membuat rayuan terhadap keputusan hakim mahkamah sesyen dan rayuan tersebut dimulakan atas dua alasan. Persoalan-persoalan yang perlu ditentukan oleh mahkamah adalah: (i) sama ada hakim mahkamah sesyen yang bijaksana telah terkhilaf kerana gagal membuat award untuk kehilangan kapasiti mendapat mata pencarian; dan (ii) sama ada hakim mahkamah sesyen telah gagal untuk membuat satu award untuk kesakitan dan kesengsaraan untuk satu pembedahan masa hadapan yang dijalani oleh plaintif.

Diputuskan, membenarkan rayuan dengan kos:

(1) Hakim mahkamah sesyen yang bijaksana tidak membuat award untuk kehilangan kapasiti mendapat mata pencarian. Penjelasan beliau dalam alasan-alasan keputusan adalah bahawa hanya doktor sahaja yang telah memberi keterangan tentang kehilangan kapasiti mendapat mata pencarian, manakala plaintif tidak menyatakan apa-apa tentangnya. Dalam membuat penilaian ganti rugi, kehilangan mata pencarian masa hadapan dan kehilangan kapasiti mendapat mata pencarian adalah tersirat dalam undang-undang, dan terangkum dalam kes-kes di mana kecederaan yang dialami adalah sedemikian yang mengakibatkan ketidakupayaan berterusan atau kekal. Hakim perbicaraan yang bijaksana sepatutnya memberi kepercayaan terhadap keterangan pakar, terutama sekali apabila ia tidak dicabar dan tiada pakar dipanggil oleh pihak pembela untuk menyangkal keterangan ini. Oleh itu, hakim mahkamah sesyen terkhilaf kerana gagal untuk membuat satu award untuk kehilangan kapasiti mendapat mata pencarian. Berdasarkan autoriti-autoriti dan inflasi dan kerugian dalam nilai wang, Mahkamah Tinggi telah membuat satu award berjumlah RM20,000 untuk kehilangan kapasiti mendapat mata pencarian (lihat ms 79B–D, G–H, 80A–B); *Lee Chong Keong v Cheang Kok Weng & Anor* [1996] 4 MLJ 133, *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786 dan *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 diikut.

(2) Persoalan seterusnya yang ditimbulkan oleh peguam perayu adalah tentang kegagalan hakim mahkamah sesyen membuat award untuk kesakitan dan kesengsaraan untuk satu pembedahan masa hadapan yang dijalani oleh plaintif untuk mengeluarkan plet dan skru-skru. Ganti rugi am yang diawardkan untuk tindakan tort yang dilakukan terhadap seseorang atau hartanahnya adalah satu remedi sivil yang bertujuan untuk meletakkan pihak yang terlibat pulih seperti asal, seboleh-bolehnya seperti keadaan

asalnya sebelum tindakan tort berlaku yang telah mengakibatkan kecederaan atau kerosakan. Walaupun ini adalah pembedahan masa hadapan, award untuk kesakitan dan kesengsaraan perlu dibuat pada tarikh keputusan agar tuntutan dapat diputuskan. Mahkamah oleh demikian telah membuat award berjumlah RM5,000 untuk kesakitan dan kesengsaraan untuk satu pembedahan masa hadapan (lihat ms 80B–D, F–G).]

Notes

For cases on loss of future earnings and earning capacity, see 6 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 609–611.

Cases referred to

Chong Chee Khong & Anor v Ng Yeow Hin [1997] 5 MLJ 786 (folld)
Lee Chong Keong v Cheang Kok Weng & Anor [1996] 4 MLJ 133 (folld)
Noe Kim Seng v Clouoh Petrosen Pte Ltd [1996] 3 SLK (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324 (refd)
Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295 (refd)
Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42 (folld)
Yang Yap Fong & Anor v Leong Pek Hoon & Anor [1987] 2 MLJ 201 (refd)

Appeal from: Civil Suit No 53–171 of 1999 (Sessions Court, Butterworth)

Baldev Singh Bhar (*Syarikat Baldev Bhar*) for the appellant.
VK Dasaratharaj Pillai (*VP Nathan & Partners*) for the respondents.

Mohd Noor Abdullah J: This is an appeal by the appellant/plaintiff against the decision of the sessions court judge and the appeal proceeded on two grounds only, namely loss of earning capacity and the failure to make an award for pain and suffering for a future operation which the plaintiff had to undergo.

At the trial in the sessions court, the plaintiff called his employer and a specialist to prove his case on the question of damages. The specialist gave evidence stating that the appellant had suffered a closed fracture of the right femur, compound fracture of the right tibia and fibula, and fracture of the fourth and fifth metacarpal (right hand). The right femur after fixation of plate and screws had healed satisfactorily, with loss of 2cm of muscles in the right thigh. In respect of the compound fracture of the tibia and fibula, there was now a 1cm shortening and stiffness of the right ankle joint. In respect of the fracture to the metacarpals, the specialist states that there was a widening of the base of the fifth metacarpal with some areas of faint sclerosis and slight shortening of the fifth metacarpal. Based on the above disabilities, the specialist states that the plaintiff has disabilities of 20–30%.

A The employer gave evidence that the plaintiff, prior to his accident on 19 July 1998 was employed at his factory as an electrical maintenance worker, with a salary of over RM1,000. After the accident, he did not work for ten months. After that, he returned to work again at the same factory.

The plaintiff at the time of the accident was 26 years old, working as an B electrical maintenance labourer. His job would require using a ladder and climbing up in high places.

The learned sessions court judge did not make an award for loss of earning capacity. His reasoning in the grounds of decision was that it was only the doctor who testified on the loss of earning capacity, whereas the plaintiff did not say so.

C

Counsel for the appellant submitted that the evidence of this nature, is always adduced by an expert, ie the specialist. The plaintiff is not an expert, and whether the court can ever accept the evidence of the plaintiff, that his disability is 20–30%. The learned trial judge should have given credence to the evidence of the expert, especially so when it remained unchallenged and D no expert was called by the defence to refute this evidence. Even an employer or a co-worker will not be able to estimate what is the percentage of loss of earning capacity except to give evidence as to his standard of performance before and after the injury.

In the Supreme Court case of *Yang Yap Fong & Anor v Leong Pek Hoon* E *& Anor* [1987] 2 MLJ 201 at p 202G, Syed Agil Barakbah SCJ with the concurrence of the other Supreme Court judges, were of the view that the opinion is relevant in considering the principle applicable to future loss of earning capacity as decided in a number of cases. An award of RM12,000 was made.

F In the case of *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295, Mohamed Azmi J (as he then was) delivering the judgement of the then Federal Court said at p 297:

> As regards loss of future earnings and future loss of earning capacity, although such loss can be implied in appropriate cases, the award should be a nominal one, unless the plaintiff can prove such a future loss is in fact sufficiently severe G to warrant a substantial award.

In *Lee Chong Keong v Cheang Kok Weng & Anor* [1996] 4 MLJ 133, Chin Fook Yen JC (as he then was) held that in assessing damages, the future loss of earnings and loss of earning capacity can be implied in law, and is included in cases where the injuries suffered were such as to lead to H continuing or permanent disability. Being a nominal worker, the plaintiff had undoubtedly suffered a set back for life, especially with some wasting of the right forearm muscles and some shortening of the leg concerned.

In *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786, Kamalanathan Ratnam JC (as he then was) awarded a sum of RM36,000 I for ten loss of earning capacity years notwithstanding the fact that the evidence disclosed no loss of future earnings. The case of Tan *Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 was followed.

In the Singapore case of *Noe Kim Seng v Clough Petrosen Pte Ltd* [1996] 3 SLK, Judith Prakash J not only made an award for loss of future earning but also a sum of RM25,000 for loss of earning capacity, as she held that if ever the plaintiff lost his job, he would be at a disadvantage in his search for a new job.

I therefore hold that the learned sessions court judge was wrong in failing to make an award for loss of earning capacity. Based on the authorities and inflation and loss in value of money, I make an award of RM20,000 for loss of earning capacity.

The next issue raised by the appellant's counsel was with regard to the failure of the sessions court judge to make an award for pain and suffering for the future operation which the plaintiff had to undergo for the removal of the plate and screws. Undoubtedly, no person likes to undergo an operation. The anxiety caused is terrible. The plaintiff will have to travel back and forth from the hospital for dressing of the surgical wound and the removal of stitches.

General damages which are awarded for a tortuous act committed against a person or his property is a civil remedy which has as its aim to put the injured party back as it were, as far as possible to his original position maintained by him prior to the tortuous act which resulted in injury or damage. There can be no better definition of general damages than that by Syed Agil Barakbah FJ when he said in *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 at p 334:

> It must be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate ... . The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant.

Although this is a future operation, the award for pain and suffering has to be made at the date of the decision so as to bring about the finality of the claim.

I therefore make an award in the sum of RM5,000 for pain and suffering for the future operation. This appeal is allowed with costs as agreed between the parties in the sum of RM4,000.

Appeal allowed with costs.

Reported by Ezatul Zuria Azhari